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MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner,*

v.

ELMORE & STAHL, *Respondent*

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER, MISSOURI PACIFIC RAILROAD COMPANY

The Association of American Railroads hereby files its Brief as *amicus curiae* in this case, pursuant to Rule 42(2) of the Rules of the Supreme Court. The Brief is accompanied by written consent to its filing from the Missouri Pacific Railroad Company and Elmore & Stahl. These are all of the parties in the case.

I. INTEREST OF AMICUS CURIAE

The Association of American Railroads (hereinafter referred to as the A.A.R.) is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico. The member railroads operate more than 95 percent of the total railroad mileage and have operating revenues of approximately 98 percent of the total railroad operating revenues of all railroads

in the United States. The activities of the A.A.R. cover a wide range, having to do with such matters as research, operation, car service, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require or lend themselves to joint handling in the interest of safe, adequate and efficient railroad service to the public.

For many years the railroads have coordinated certain matters relating to freight loss and damage claims through a central agency, which is now the Freight Claim Division of the A.A.R., with headquarters in Chicago. The agency began in 1892 as the Freight Claim Association. The responsibilities of the Freight Claim Division, A.A.R., include promotion of prompt and lawful adjustment of freight loss and damage claims, and the equitable apportionment among carriers of amounts paid in such settlements. The Division publishes a code of *Principles and Practices for the Investigation and Disposition of Freight Claims* and a code of *Freight Claim Rules*, and progresses numerous activities in the interest of improving freight claim procedures and the reporting of freight claim statistics and minimizing claim adjustment problems of a general nature.

The A.A.R. is the joint representative and agent of these railroads in connection with federal legislation and with legal matters of common concern to the industry as a whole. It has an interest in significant interpretations of federal law that will apply generally to all of its members. The issues raised in the present case relating to the proper construction of the federal law governing carrier liability for deterioration or spoilage of perishables in transit are important to the entire railroad industry.

During the year 1962, for example, 33 of the principal fresh fruit, melon, and vegetable carrying railroads in the United States reported having paid a total of $8,328,470 in freight loss and damage claims with respect to carload shipments of those commodities.[1] This amount, in the main, represents claim payments where some fault of the railroad was indicated. It is thus clear that the carriers already are subject to a burdensome difficulty in terms of loss and damage in the handling of perishables. If the holding of the Supreme Court of Texas is affirmed as the federal law, the problem for the railroad industry will be greatly magnified and the burden intolerable.

II. INTRODUCTORY STATEMENT

Briefly, the facts of the instant case embrace the shipment of one refrigerator car (ART 35042) of honeydew melons from Rio Grande City, Texas, to Chicago, Illinois. The melons were received by the railroad in apparent good order at Rio Grande City. The shipper elected and directed that the protective service to be accorded by the railroad would be that of "standard refrigeration." Upon arrival at destination the melons were discovered to have undergone spoilage or decay.

In the trial court, the jury made several special findings, among which were those summarized as follows:

1. That when tendered to the carrier by the shipper, the melons were in such condition that they would have been reasonably expected to arrive at destination in good merchantable condition;

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[1] Association of American Railroads, Freight Claim Division, Circular No. FCD 1897 (June 24, 1963).

2. That at the time of arrival at Chicago, the melons were in a worse condition than would reasonably have been anticipated; and

3. That the transportation services were performed by the carrier without negligence, and as instructed by the shipper and in a reasonably prudent manner.

On the basis of the special findings by the jury, the Supreme Court of Texas upheld the Texas Court of Civil Appeals' ruling, which in turn upheld the trial court's ruling that the railroad was liable for the spoilage of the melons.

The issue before this Court, stated simply, is this: When a shipper of a perishable commodity establishes and relies upon a *prima facie* case of deterioration or decay of a perishable commodity, does proof and a jury finding that the railroad was free from negligence constitute a complete defense to the *prima facie* case relied upon by the shipper?

It is the position of the A.A.R. that, at common law and under the provisions of the shipping contract, proof and a jury finding that the railroad performed its services without negligence and in accordance with the instructions of the shipper constitutes a complete defense to the *prima facie* case relied upon by the shipper. This is fully and convincingly argued in the brief of petitioner, Missouri Pacific Railroad Company, and we agree with and adopt the argument there set forth.

There are several points that we should like to emphasize and there are additional aspects we should like to present, all of which have substantial bearing on the issue before this Court.

III. SUMMARY OF ARGUMENT

1. The loss for which recovery is sought in this case was indisputably loss in the nature of deterioration and decay of the perishable commodity. The plaintiff relied upon a *prima facie* case. There was a jury finding that the railroad's services were performed without negligence, in complete accordance with the shipper's instructions, and in all respects in a prudent manner.

Under these facts, the Supreme Court of Texas erred in construing the common law so as to hold the railroad liable unless it affirmatively established that the deterioration and decay was due *solely* to some excepted cause. At common law a railroad is not liable for deterioration and decay of a perishable commodity when its services have been performed without negligence and in complete accordance with the shipper's instructions.

2. The railroad's liability is fixed by the terms and conditions of the shipping contract. Under the shipping contract the railroad's liability for deterioration or decay of the perishable commodity was a liability for negligence only. If the shipping contract coincides with the common law in this respect, the non-liability of the railroad rests, nevertheless, upon the shipping contract. If the common law be as the Supreme Court of Texas construed it, then there is a conflict between that common law and the terms and conditions of the shipping contract. In such event, the shipping contract must prevail, and the railroad is not liable for the deterioration or decay when its services have been performed without negligence and in complete accordance with the shipper's instructions.

3. The shipping contract contains an express exception of liability for loss in the nature of deterioration and decay, in the absence of negligence on the part of the railroad. Since the loss was in the nature of deterioration and decay, a *prima facie* case was made for the exception and the burden was on the shipper to prove negligence by the carrier.

4. Expert knowledge of the characteristics, peculiarities, defects, or vices of his perishable commodity rests solely in the shipper. The railroad neither has nor should it be chargeable with such knowledge. Accordingly, in instances of deterioration or decay of a perishable commodity, sound public policy requires or justifies a restriction of railroad liability to that for its own negligence, whether such restriction be found in the common law or made in the shipping contract.

IV ARGUMENT

POINT 1

Under Federal Common Law a Railroad is not Liable for the Deterioration or Decay of Perishable Commodities where the Railroad's Services have been Performed without Negligence.

The Supreme Court of Texas erroneously construed and applied the federal common law. In effect, the Texas Supreme Court's decision makes the railroad an insurer with respect to the condition of perishable commodities and liable for their deterioration or decay unless the railroad meets the burden of establishing by affirmative evidence that the deterioration or decay was the result of an act of God, the public enemy, the fault of the shipper, or the inherent nature of the goods themselves. The Court said:

> Where the common law rule is strictly enforced, the carrier is not an insurer with respect to damage caused solely by one of the excepted perils, but its responsibility is similar to that of an insurer in so far as other risks are concerned. (Trans. p. 241)

The Court was of the view that "where the loss is not due to one of these specified causes, it is immaterial whether the carrier has exercised due care or was negligent." (Trans. p. 238) Consequently, the Court held that in the instance of deterioration or decay of inanimate perishables the railroad may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss and damage was caused by one of the four excepted perils recognized at common law. (Trans. p. 237)

Contrary to the holding of the Texas Supreme Court, the common law relieves a railroad of liability for the deterioration or decay of perishables where the services of the railroad have been performed without negligence. *Schouler's Bailments and Carriers,* Third Edition, § 416; *Angell On Law of Carriers,* § 210. In the leading case of *Southern Pacific Company v. Itule,* 51 Ariz. 25; 74 Pac. 2d 38; 115 ALR 1268 (1937), the court dealt with the matter of liability and burden of proof with respect to a shipment of tomatoes that arrived at destination in a deteriorated or decayed condition. The court stated the question before it as follows:

> The matter which was in dispute was whether these goods partook of the nature of ordinary inanimate bodies, and the burden of showing the specific cause of the damage was on the

> carrier, or whether they were rather of the character of livestock, and it was sufficient for the carrier to show it had not been guilty of any actual negligence in transportation, without the necessity of proving the specific reason for the injury. *The great majority of modern cases take the latter view.* Howe v. Great Northern R. Co. 176 Minn. 46, 222 N.W. 290; Cassone v. New York, etc. R. Co., 100 Conn. 262, 123 A. 280; Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A. 193, 458; Fean v. Alabama Great Southern R. Co. 26 Ohio App. 96, 159 N.E. 487; W. E. Roche Fruit Co. v. Northern Pac. R. Co., 184 Wash. 695, 52 P.2d 325. There are a few, however, which apparently hold to the contrary. Chesapeake & O.R. Co. v. Timberlake, 147 Va. 304, 137 S.E. 507. (p. 41) (Emphasis supplied)

Referring to the perishable nature of the commodity, the court commented:

> It is a notorious fact, of which the courts may well take judicial notice, that all fruits and vegetables of every nature will ultimately decay, although no human agency has approached them after their maturity. (p. 41)

The court then stated the common law rule to be:

> We think the fairer and more logical rule is that in cases of the shipment of perishable fruits and vegetables, *when the carrier shows affirmatively that it handled them in the method requested by the shipper, and that it exercised reasonable care to prevent any damage from any cause not necessarily involved in the method of transportation so chosen,* that it has satisfied the requirements of the law in regard to the quantum of proof required to es-

> tablish a defense to the action. (pp. 41, 42) (Emphasis supplied)

The Supreme Court of Texas referred to the *Itule* case, *supra,* as "perhaps the leading authority" in support of the rule that the common law rule of liability as an insurer does not apply in the case of perishable goods and that liability for loss or injury in the nature of deterioration or decay depends in all cases upon negligence. Immediately after this reference, and in apparent answer to the *Itule* case, the Supreme Court of Texas said:

> The parties here agree, however, that the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions. (Trans. p. 239)

There is no distinction, however, between the rule of common law recognized by the *Itule* case, *supra,* and the federal law. In *Larry's Sandwiches, Inc. v. Pacific Electric Ry. Co.,* 318 F.2d 690 (9th Cir. 1963) the Court said that the Carmack amendment had been construed as codifying the common law rule of a carrier's liability and that

> Where perishable goods are involved the provisions of the Carmack amendment codifying the common law are given force through the Perishable Protective Tariff No. 18 of the General Rules and Regulations of the Interstate Commerce Commission. *Rules 130 and 135 of that tariff establish the tests of negligence.* (p. 692) (Emphasis supplied)

The Court then stated the rule as follows:

> Thus, in the case of perishable goods *the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions.* See e.g., *U.S. v. Reading Company,* supra; *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.* (7 Cir. 1956) 236 F.2d 908, 909-910; *Delphic Frosted Foods Corp. v. Illinois Central R. Co.* (6 Cir. 1961) 188 F.2d 343, 346-347. (pp. 692-693) (Emphasis supplied)

It is clear the court in the *Larry's Sandwiches* case considered that under the federal common law a carrier's liability for the deterioration or decay of perishable goods is predicated upon negligence of the carrier. Since Rules 130 and 135 of the shipping contract established negligence as the test of liability and since the Carmack amendment made the carrier liable for damage caused by it, the court was of the view that the Carmack amendment and Rules 130 and 135 expressed the federal common law.

In *Trautmann Bros. Co. v. Missouri Pacific Railroad Co.* 312 F.2d 102, (1962) the Court of Appeals, Fifth Circuit, was of the view that, in instances of deterioration or decay of inanimate perishable commodities, proof of absence of negligence on the part of the carrier constituted a defense. See also *Atlantic Coast Line R. Co. v. Georgia Packing Co.* 164 F.2d 1 (5th Cir. 1947).

Referring to the contention of Petitioner in the court below, the Supreme Court of Texas said:

> It [Petitioner] seems to be saying that when the claim is for spoilage or decay, the carrier

should have the benefit of a presumption that the damage was due solely to natural deterioration. We do not agree. (Trans. p. 243)

We agree with Petitioner that in instances of spoilage and decay of perishables, where it is found that the carrier performed all transportation services without negligence, the case is one falling within the "inherent vice" exception. However, we do not think that the matter need necessarily be expressed in terms of the availability of an "exception". We think it is just as true to say that where the damage is in the nature of spoilage or decay, the common law imposes no liability upon the carrier, in the absence of negligence on the part of the carrier. *Larry's Sandwiches* case, *supra*, *Trautmann* case, *supra*, *Itule* case, *supra*.

The common law rule clearly is that where the damage is in the nature of spoilage or decay and the carrier has established that its services were performed without negligence, it has met the only burden of proof imposed by the common law and need not go further and establish the particular cause of the spoilage or decay.

Point 2

Where Perishable Goods are Received in Apparent Good Order and Delivered by the Railroad in a Deteriorated or Decayed Condition the Liability of the Railroad must be Determined in Accordance with the Terms and Conditions of the Shipping Contract and Under Such Contract the Railroad is not Liable when its Services Have Been Performed without Negligence.

The Texas Supreme Court construed the shipping contract as imposing upon the railroad full common

carrier liability as at common law. We previously have pointed out that at common law a railroad is not liable for damage in the nature of spoilage and decay of perishable commodities when it is shown that the services of the railroad were performed without negligence and in complete accordance with the shipper's instructions.

The Texas Supreme Court, however, construed the common law as imposing on the railroad an insurer's liability for the spoilage or decay unless the railroad established by affirmative proof that the spoilage or decay was due entirely to the inherent nature of the goods. That Court refused to construe the provisions of the shipping contract as limiting the railroad's liability for damage in the nature of spoilage or decay to liability solely for its own negligence. In so doing the Supreme Court of Texas must have been influenced largely by its view that

> Neither the Congress nor the Federal courts have declared that the liability of a common carrier for damage to inanimate perishables may be predicated only upon negligence. (Trans. p. 243)

It is a well recognized and accepted principle that a carrier may limit its liability by valid contract with the shipper. The only restrictions on such limitations are that they shall not relieve the carrier of its own negligence or wrongful act and that the limitations so provided shall not be contrary to public policy. *Cau v. Texas & Pacific Ry. Co.*, 194 U.S. 427, 48 L.Ed. 1053, 24 S.Ct. 663, (1904); *York Co. v. Central Railroad*, 3 Wall. 107 (1865); *Southern Express Co. v. Caldwell*, 88 U.S. 264, 22 L.Ed. 556, 21 Wall. 264, (1874);

Hutchinson on Carriers (3rd Ed.) §§ 390, 401, 418.

That a railroad may limit its liability for spoilage or decay of perishables to that for its own negligence is made clear in *Atlantic Coast Line R. Co. v. Georgia Packing Co., supra.* The Court there said:

> With respect to the degree of care required of a carrier in the transporting or refrigeration of perishable goods, the shipment of goods by rail interstate is subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. Under § 20 of that act, the responsibility assumed by the carrier is fixed by the agreement made and contained in the bill of lading, in accordance with published tariffs and regulations. Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209, 51 S.Ct. 453, 75 L.Ed. 983; Lancaster v. McCarty, 267 U.S. 427, 45 S.Ct. 342, 69 L.Ed. 696; Boston & Maine R. Co. v. Hooker, 233 U.S. 97, 34 S.Ct. 526, 58 L.Ed. 868, L.R.A. 1915B, 450, Ann. Cas. 1915D, 593; Standard Hotel Supply Co. v. Pennsylvania R. Co., D.C., 65 F. Supp. 439. (p. 3)

The Court then referred to Rules 130 and 135 of the Perishable Protective Tariff and held:

> It is apparent that these rules limit the liability of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper. (p. 3)

In the later case of *Trautmann Bros. Co. v. Missouri Pacific Railroad Co., supra,* after referring to Rules 130 and 135 as limiting the liability of a carrier transporting perishable goods to that for its own negligence, the same Court pointed out that:

> Nothing in Section 20(11) of the Transportation Act, 49 U.S.C. § 20(11), precludes a carrier's limiting its liability in that manner, notwithstanding appellant's contention to the contrary. The section provides simply that a carrier cannot limit its liability for damages *caused by the carrier.* (p. 104)

The shipping contract in the case under review contained provisions limiting the liability of the railroad for damage in the nature of spoilage or decay to that of liability for negligence only.

The shipping contract consists of the bill of lading and the provisions, rules and regulations of applicable tariffs lawfully published and filed with the Interstate Commerce Commission. No departure is permitted from the terms and conditions of the shipping contract, including those with respect to liability of the railroad. *Southern Railway v. Prescott,* 240 U.S. 632, 60 L.Ed. 836, 36 S.Ct. 469, (1916); *Atlantic Coast Line R. Co. v. Georgia Packing Co., supra.*

The bill of lading provides that the goods are "received, subject to the classifications and tariffs in effect" and that every service to be performed thereunder "shall be subject to all conditions not prohibited by law . . . including the conditions on the back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns." The form and terms of the bill of lading are a part of the Uniform Freight Classification No. 4, one of the applicable railroad tariffs lawfully published and filed pursuant to § 1(6) of the Interstate Commerce Act, 49 U.S.C. § 1(6). The form and terms of the bill of lading were found reasonable and were prescribed by the Interstate Commerce Commission in *Bills of Lading,* 52 ICC.671 (1919); *Ex-*

port Bill of Lading, 64 ICC 347 (1921); *Domestic Bill of Lading and Live Stock Contract*, 64 ICC 357 (1921).

The bill of lading in the instant case was that known as the Uniform Straight Bill of Lading (Trans. pp. 157-163). Sections 1(a) and (b) of the bill of lading deal with carrier liability.[1]

Rules 130 and 135 of Perishable Protective Tariff No. 17[2] are the rules of that particular tariff dealing with liability of a railroad when transporting a perishable commodity and were approved by the Interstate Commerce Commission. *Perishable Freight Investigation*, 56 ICC 449 (1920).

Rule 1 of Uniform Freight Classification No. 4[3] also contains provisions dealing with liability of the railroad.

Validity of the provisions of the shipping contract is not in issue.

The classification is a tariff lawfully on file with the Interstate Commerce Commission and having the force and effect of federal statute. *Southwestern Sugar and Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 3 L.Ed. 2nd 1334, 79 S.Ct. 1210, (1959). This Court accordingly is requested, subject to its discretion, to take judicial notice of Rule 1 thereof. *New York Central R. Co. v. Berry Sons' Co.*, 338 Pa. 500, 12 Atl. 2d 588 (1940); *Schroader v. Railway Express Agency*, 237 N.C. 456, 75 S.E.2d 393 (1953).

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[1] Provisions of §§ 1(a) and (b) are set out at page 36 of Appendix hereto.

[2] Provisions of Rules 130 and 135 are set out at page 37 of Appendix hereto.

[3] Provisions of Rule 1 of Uniform Freight Classifications No. 4 are set out at pages 37-39 of Appendix hereto.

The Supreme Court of Texas failed to analyze properly the fundamental meaning and effect of the provisions of the shipping contract as they relate to carrier liability and the burden of proof with respect thereto. That Court's treatment of the provisions of the shipping contract gives Rules 130 and 135 no meaningful effect whatsoever. Indeed, it concluded that the terms of the shipping contract did no more than state the common law, which law would have been applicable had there been no expressed shipping contract at all. It concluded that the instant case was one to be governed entirely by the common law and that the railroad could only relieve itself of liability for the deteriorated or decayed condition of the melons in question by affirmative proof that the deterioration or decay was caused by the inherent nature of the commodity.[1]

Rule 1(b) of the Uniform Freight Classification gave the shipper the option of shipping his perishable goods subject either to the terms and conditions of the shipping contract that he entered into or under liability imposed by common law, as he "may elect to have a limited liability or a common carrier's liability service." (App. p. 37). Rule 1(c) provides that if he elects not to accept all the terms and conditions of the shipping contract he should so notify the agent of the carrier at the time his property is offered for shipment. Rule 1(d) provides that if such notice is given the property "will be carried at carrier's liability, limited only as provided by common law, and by the laws of the United States and of the several States insofar as they

[1] As pointed out in Brief of Petitioner, the Texas Supreme Court seemingly went so far as to hold that the deterioration or decay must be shown to have resulted from a peculiar or distinctive vice existing in the particular melons.

apply, but subject to the terms and conditions" of the bill of lading "insofar as they are not inconsistent with such common carrier liability." (App. p. 38). In that event it was provided that the rate charged by the carrier would be 10 percent higher. (App. p. 38)

In the instant case the shipper elected to have his goods transported under "limited liability" and subject to the terms and conditions of the usual shipping contract.

To interpret the shipping contract entered into, as did the Texas Supreme Court, as imposing upon the railroad full common carrier liability at common law, as it construed the common law, would make utterly meaningless the provisions of the foregoing rule and utterly meaningless the terms and conditions of the shipping contract. Obviously a distinction between common carrier liability at common law and the carrier's liability under the usual shipping contract was provided.

Where the shipper, exercising his election, does not contract for full common law liability of common carriage but accepts the provisions of the usual shipping contract, there is a valid agreement that the carrier's liability, if so provided, shall be less than the full liability under common law. As stated by the Interstate Commerce Commission in *Export Bill of Lading, supra,* the usual shipping contract provides for the carrier substantially less than the full common law liability of the common carrier.

> The greater the risk, the greater is the value to the shipper of the service rendered, which should be rewarded accordingly. *A lesser compensation is appropriate in cases where the*

> *carrier is to a large extent relieved from the full liability of common carriers.* (p. 354) (Emphasis supplied)

In the instant case the shipper elected to have his perishable melons transported at the lesser compensation appropriate where the carrier was relieved from the full common law liability of common carriers.

In *Bills of Lading, supra,* the Interstate Commerce explained:

> So, the law is now well settled, both in this country and in England, that a carrier may, unless forbidden by statute, limit or restrict, or even extend and enlarge, its common-law liability. Such contracts must, however, be invested with all the requirements of validity attaching to other forms of contract. Mutual assent and a valuable consideration must exist to support the assumption by the carrier of more than its common-law risks or, on the other hand, to support a restriction or limitation of those risks. A consideration for the latter is usually found in the agreement by the carrier to apply a lower or, as it is expressed in the governing freight classifications in effect in this country, "reduced" rate; and this is a sufficient consideration. (pp. 680-681)

Rule 1 of Uniform Freight Classification No. 4 is of the type referred to in the above statement of the Interstate Commerce Commission, and the "reduced" rate referred to is the same as the "reduced" rate referred to in Uniform Freight Classification No. 4, Rule 1(c). (App. p. 38)

As far back as 1898, by provisions in a prior freight classification, lawfully published and filed with the In-

terstate Commerce Commission, the railroads offered shippers a choice of common carrier common-law liability or limited liability. *Mannheim Ins. Co. v. Erie & Transp. Co.*, 72 Minn. 357, 75 N.W. Reporter 602 (1898). There the Court pointed to the election offered the shipper in the freight classification there applicable and stated:

> It is a matter of common knowledge that the great bulk of the freight of the country is now transported under bills of lading limiting the common-law liability of the carrier. It is the exception, and not the rule, for property to be carried under the full common-law liability. (p. 604)

A construction of Rules 130 and 135 of Perishable Protective Tariff No. 17 in accordance with their meaning and, as must be done, with a view to giving them effective application *(Illinois Steel Co. v. Baltimore & Ohio R. Co.*, 320 U.S. 508, 88 L.Ed. 259, 64 S.Ct. 322, (1944) makes it clear the rules provide that the railroad is not liable for the deteriorated or decayed condition of perishables where its service is performed without negligence and in accordance with shipper instructions.

Rule 130 of Perishable Protective Tariff No. 17, and as such a provision of the shipping contract, is set forth under the heading: "Condition of Perishable Goods Not Guaranteed by Carriers." This is an express disavowal by the carrier of liability as an insurer when transporting a perishable commodity. The rule further provides that the undertaking of the carrier simply is to retard deterioration or decay "insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed

without negligence." (App. p. 37). The tariff rule is a clear statement that the railroad will not be liable for loss or damage in the nature of deterioration or decay unless caused by negligence on its part. Referring to the rules in the perishable protective tariff dealing with carrier liability and duty, the Interstate Commerce Commission, in *Perishable Freight Investigation, supra,* said:

> These declarations are predicated upon the special hazard resulting from the perishable nature of the freight, or from the exercise by the shipper of some measure of control over the form or degree of protective service accorded. (p. 481)

As respects any particular shipment of a perishable commodity, the protective service selected and directed by the shipper and performed by the railroad may or may not succeed in retarding the processes of deterioration or decay. In either event, and with respect to that particular shipment, retardation of deterioration or decay will, in the language of Rule 130, have been achieved "insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper." In the absence of a showing of carrier negligence, if the protective service rendered has not succeeded in retarding the processes of deterioration or decay, then, by the terms of the rule in the shipping contract, the railroad is not liable for loss or damage in the nature of deterioration or decay.

Rule 135, inserted in the tariff at the direction of the Interstate Commerce Commission, provides that "the duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent

so directed or elected by the shipper. . . ." Here, again, the rule required by the Commission is a clear statement that the sole duty resting upon the railroad is to perform the service without negligence.

These provisions in the shipping contract for non-liability are not concerned with the cause of the deterioration or decay of the perishable goods in the absence of negligence or fault on the part of the railroad. Clearly they make liability of the railroad wholly dependent upon its own negligence.

The railroad's liability is fixed by the shipping contract. The condition of the contract is that the railroad shall not be liable in the instance of deterioration or decay of a perishable commodity where its services have been performed without negligence. If this is the common law, as we hereinbefore have pointed out, the non-liability of the carrier rests, nevertheless, upon the express provisions of the shipping contract. If it be not the common law, as was the view of the Supreme Court of Texas, the railroad's limited liability is fixed, nevertheless, by the terms of the shipping contract.

We do not mean to suggest that, in the case of the precise claim at bar, the common law imposes a greater liability than that imposed by the terms of the shipping contract. As we have argued, it is clear from the modern cases that the common law does not recognize liability on the part of the carrier for the spoilage and decay of perishables where the carrier performs the transportation services without negligence and in accordance with the instructions of the shipper. However, we do contend that the effect of Rule 1(b) of the Uniform Freight Classification is to confirm the controlling applicability of Rules 130 and 135 of the Perishable Protective

Tariff, which form a part of the shipping contract, and which very clearly establish that the carrier is not liable for the spoilage and decay of perishables, absent negligence or failure to follow the shipper's instruction.

In the instant case not only did the shipper fail to prove any negligence or fault on the part of the railroad, but there was evidence and a jury finding that the railroad was not guilty of any negligence or fault. Such constituted a complete defense to the so-called *prima facie* case relied upon by the shipper. *Larry's Sandwiches* case, *supra; Trautmann* case, *supra.*

POINT 3

Under the Terms of the Shipping Contract the Fact that the Injury or Damage to the Perishable Goods was in the Nature of Deterioration or Decay made a* Prima Facie *Case for the Exception Provided in the Shipping Contract and the Burden was on the Shipper to Establish Negligence on the Part of the Railroad.

We have pointed out previously that Rules 130 and 135 of Perishable Protective Tariff No. 17 are a clear statement that the railroad is not liable for loss or damage in the nature of deterioration or decay unless shown to be caused by negligence on its part. In the instant case the evidence established beyond question that the injury to the melons was in the nature of deterioration or decay. Since the injury was of the nature of deterioration or decay, that fact made a *prima facie* case that the injury came within the exception to liability under the shipping contract.

Insofar as liability for deterioration or decay is concerned, the shipping contract with the railroad is analogous to and identical in effect with contracts of

affreightment entered into by steamship companies and which provide an exception to liability for loss or damage of a particular nature, such as decay, when not shown to have been caused by the carrier's negligence. That such cases may be those involving water carriers adds or subtracts nothing from the expressed meaning of the provisions of the contract as interpreted by the courts or the holdings with respect to the burden of proof of negligence or of excepted liability.

In a case involving the transportation of rice under a contract of affreightment providing that the ship "is not to be liable for sweat, rust, decay, vermin, rain or spray", this Court recognized that such provision did not relieve the carrier of liability for injury of that nature when caused by its own fault or negligence, but stated the rule in *The Folmina,* 212 U.S. 354, 53 L.Ed. 546, 29 S.Ct. 363, (1909), as follows:

> Of course, where goods are delivered in a damaged condition, plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss, as *the very fact of the nature of the injury shows the damage to be prima facie within the exception,* and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. (p. 362) (Emphasis supplied)

In *The Monte Iciar,* 167 F.2d 334 (1948), the Circuit Court of Appeals, Third Circuit, had under consideration a case involving a shipment of wooden barrels containing dry sherry. The shipping contract provided that the carrier would not be responsible for leakage, breakage or spigoting. The loss was in the nature of

leakage. The Court ruled that such a loss was *prima facie* within the exception to the shipping contract, quoting from *The Folmina, supra,* and held that where the injury was of such *nature* as to come within the exception in the shipping contract the burden is upon the shipper to show that the loss occurred as a result of negligence on the part of the carrier.

In *The Henry B. Hyde,* 90 Fed. Rep. 114 (1898) the shipping contract contained a provision that the ship was "not accountable for leakage, rust, or breakage." It was admitted that the goods were received in good order and condition and were damaged while on the voyage, the injury being in the nature of breakage. No evidence was introduced by either party to show from what cause the breakage occurred. The Circuit Court of Appeals, Ninth Circuit, held:

> It is conceded that the carrier may limit its liability by such a contract with the shipper, but that, notwithstanding such limitation of liability, the ship shall still be answerable for the negligence of its officers and employes. There is only one question, therefore, before the court, and that is, upon which party rests the burden of proof to show whether or not there was negligence? The rule seems to be well settled by the authorities that, in determining whether or not an injury to goods is of such a character as to come within an exception of liability which is provided for in the bill of lading, the burden of proof is cast upon the carrier; but that *after it is once determined that the injury is of a nature, or has occurred from a cause, for which liability is excepted, it devolves upon him who claims damages to show that the loss occurred through the carrier's negligence.* The Delhi, 4 Ben.

345, Fed. Cas. No. 3,770; Vaughan v. 630 Casks of Sherry Wine, 7 Ben. 507, Fed. Cas. No. 16,900; Wolff v. The Vaderland, 18 Fed. 733; The New Orleans, 26 Fed. 44; The Timor, 14 C.C.A. 412, 67 Fed. 365; Clark v. Barnwell, 12 How. 272; Transportation Co. v. Downer, 11 Wall. 129. *In the present case no question arose concerning the nature of the damage that had been sustained.* The loss was wholly from breakage. It is so alleged in the libel. The ship was not accountable for breakage. *There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which excepted liability. . . .*

In the present case the stipulation was explicit. *The nature of the injury indicated for itself that it belonged within the specified exemption from liability.* The burden of proof therefore rested upon the libelants to establish by the evidence that the breakage occurred through the negligence of the ship's employes. No evidence having been offered to the court to prove such negligence, we find no error in the decree dismissing the libel. (pp. 115-116) (Emphasis supplied)

See also *The Lennox,* 90 Fed. Rep. 308 (1898)

The rule fixed by the foregoing authorities is clear.

The exceptions to liability provided in a shipping contract may be of two kinds, namely, (a) exceptions of injury resulting from certain specified causes, and (b) exceptions of injury of a certain nature itself.

In instances coming within (a), above, the carrier must show the injury to have resulted from the excepted cause, while in instances falling under (b), above, the

carrier need submit no proof of cause and the shipper must show the excepted injury to have been caused by the carrier's negligence.

The shipping contract in the instant case, with respect to a perishable commodity, contains an exception from liability of injury or damage of a certain *nature*, namely, deterioration or decay. The evidence established that the injury unquestionably was in the nature of deterioration or decay and a *prima facie* case was thus made for the exception in the shipping contract. It was not incumbent upon the railroad to show that the injury of the excepted nature resulted from any particular cause, but simply that the injury was of that nature. The shipping contract clearly provided that the railroad would not be liable for injury in the *nature* of deterioration or decay, where the railroad's service is "performed without negligence."

Under the posture of the case below and applying the rule of law clearly applicable, since the injury was of an excepted nature, a *prima facie* case was made for the exception, and the burden was on the shipper to establish negligence on the part of the carrier.

Even if the shipping contract should be construed as placing upon the railroad the burden of establishing that it was free from negligence in order to bring the injury within the *nature* excepted by the contract, that burden was met fully by evidence and a jury finding that the railroad was not guilty of fault or negligence. *Larry's Sandwiches, Inc. v. Pacific Electric Railway Co., supra; Trautmann Bros. Co v. Missouri Pacific Railroad Co., supra.*

POINT 4

In Instances of Deterioration or Decay of Perishables, Where the Railroad's Service Has Been Performed Without Negligence and in Complete Accordance with the Shipper's Instructions, the Loss Properly Should Be Borne by the Shipper or Owner of the Perishable Goods.

One engaged in the production and marketing of perishable commodities is of necessity engaged in the production and marketing of a commodity which has an inherent weakness or vice. By the commodity's very nature it inevitably will undergo a process of deterioration and decay. Besides the inherent and characteristic weakness or vice of being subject to the processes of deterioration and decay, practically every perishable commodity is capable of having within itself special defects or vices, not apparent from visual inspection of the commodity in its natural state, that may cause more rapid deterioration or decay and notwithstanding its handling according to the best known and accepted customs and practices of the trade.

The shipper or owner of the perishable commodity is peculiarly knowledgeable with respect to these matters. The extent of maturity and ripeness of his produce; its peculiar characteristics and weaknesses; the circumstances, including weather and climatic conditions, under which it was grown and harvested; the circumstances and duration of its storage prior to shipment; the nature and extent of preparation, treatment, handling and packing necessary to place it in a marketable condition, are all matters with respect to which the shipper is peculiarly and solely knowledgeable. For example, tomatoes harvested immediately after heavy rainfall are especially vulnerable to deterioration and

decay and regardless of the protective service rendered. Apples that have been in cold storage for a certain period of time and are shipped in a given season will have inherent weaknesses that will not be found in apples that have been in cold storage for a different period of time, whether shipped in the same or a different season. The apple, peach or pear, which from all outside and visible appearances may seem in good order, may have concealed and inherent weaknesses leading to deterioration or decay and against which no protective services could guard during shipment.

Referring to such matters as those recited above, the Interstate Commerce Commission, in *Perishable Freight Investigation, supra*, explained:

> The degree and amount of refrigeration required vary widely. Some kinds of perishable freight need more ice than others or a different method of icing. Thus, citrus fruits differ in this respect from deciduous fruits. Berries deteriorate more rapidly than peaches, and apples are less perishable than either. Vegetables have equally varied characteristics. Fresh meat requires the maximum degree of refrigeration. Fruit or vegetables precooled before shipment require less ice in transit than when loaded direct from field or orchard. Packing-house and dairy products are generally precooled and when reduced to a very low temperature, as they sometimes are, in a measure take the place of ice. Seasonal conditions produce somewhat similar variations. To some extent refrigeration practices are dictated by commercial exigencies. For example, fruit shipped to a cannery for preserving purposes requires less protection than fruit shipped to the market for sale. Frequently suf-

> ficient protection against heat may be obtained by the use of an un-iced but insulated and ventilated car; and this is also true of protection against cold. As will later appear, these briefly enumerated peculiarities and incidents of refrigeration have a bearing in determining fair and reasonable charges. (p. 454)

Not only do these peculiarities and characteristics have a bearing in determining a fair and reasonable service but, we submit, being matters within the peculiar knowledge of the shipper, they have substantial bearing upon the question of who should bear loss in the matter of deterioration or decay where the railroad's services have been performed without negligence and in complete accordance with the shipper's instructions.

Equally appropriate is the comment of the Interstate Commerce Commission in *Providence Fruit & Produce Exchange v. New York Central & Hudson River Railroad Company*, 33 ICC 294 (1915):

> The need for ice varies with the condition of the shipment when loaded and the method of loading. Ripe fruit needs more refrigeration than green; cold-storage fruit more than fresh; fruit grown in a wet season more than fruit grown in a dry season; fruit loaded five tiers high more than fruit loaded three or four tiers; and fruit without spaces between the crates more than fruit loaded with spaces between crates.
>
> *Carrier's employees at the icing stations ordinarily are familiar with none of these matters, especially with respect to particular shipments.* It was testified that even if they opened the car and examined its contents they would be none the wiser because of their lack

> of expert knowledge; that an inspection of the freight would indicate the amount of ice needed only to an expert fruit man; and that even if carrier's employees possessed such knowledge, the opening of the car door might do considerable injury to the freight, and further, would break the seal record, thus hampering the investigation of claims for loss. (p. 295) (Emphasis supplied)

The Commission commented further upon the responsibility resting on the railroad and pointed out that the railroad could not be expected to substitute its discretion or judgment for the more expert knowledge of the shipper as to the requirements of particular shipments.

> The responsibility rests upon the defendant to comply with shippers' instructions under ordinary conditions and to exercise all reasonable precaution to protect the shippers' interests under emergencies which arise from time to time. There is no evidence that the defendant has failed to meet these obligations. *It can not be expected to substitute the discretion or judgment of its employees for the more expert knowledge of the shipper as to the requirements of particular shipments.* (p. 296) (Emphasis supplied)

Railroad tariffs provide a wide range of protective services from which the shipper may elect and direct that to be accorded his shipment. That the protective service so elected is or should be adequate to arrest or retard deterioration or decay of his particular goods is a matter lying peculiarly within the knowledge of the shipper. The carrier simply agrees to render the serv-

ice so elected by the shipper and without negligence on the part of the carrier.

The Supreme Court of Texas, in its opinion below, sets out the following quotation from the case of *Schnell v. The Vallescura*, 293 U.S. 296, 79 L.Ed. 373, 55 S.Ct. 194 (1934):

> The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. (Trans. p. 240)

We find two difficulties with the Texas Court's quotation from and reliance upon this case. First, the evidence in that case established that the carrier was guilty of negligence and therefore had not discharged the duty imposed upon it. Second, we believe the duty referred to in the above quotation simply is to transport the perishable commodity in a careful and safe manner, that is, free from any negligence or fault in the performance of the carrier's service. In no other way can we reconcile statements that discharge of the duty is peculiarly within the carrier's control and that all the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. With

respect to such matters as we previously have pointed out, which are simply by way of illustration, we believe most of the facts and circumstances that would lead to the deterioration or decay of his perishable commodity lie peculiarly within the knowledge of the shipper. Such is the basis for the fundamental division of responsibility laid down in the leading English case where it was said "the carrier answers for his ship and men, the cargo-owner for his cargo". *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Company Ltd.*, 137 Law Times Rep. 266 (H.L. 1927).

This division of responsibility has been the basis for the custom in the railroad industry to decline payment of claims for deterioration or decay of perishables where the railroad services have been performed without negligence and in complete accordance with the shipper's instructions. Such a case is customarily referred to, in the language of the trade, as a "clear record cases". This practice is of many years standing and has been generally accepted by all parties concerned.

The decision of the Supreme Court of Texas would constitute a vital change in this respect. In all probability there would be a substantially greater movement of perishables that are not in proper condition to withstand the normal hazards of transportation, even under the best of refrigerated service. Whether perishables would be in such condition at point of origin is a matter lying peculiarly within the knowledge of the shipper, and one with respect to which railroad personnel cannot reasonably be expected to be knowledgeable. They neither could nor should substitute their judgment for the informed and expert knowledge of the shipper.

If the shipper knows that the railroad will be liable

even under a clear record of handling without negligence and in full compliance with the shipper's instructions, there is certain to be an increased tendency on the part of shippers to ship perishables so long as they ostensibly are in suitable condition and without regard to their actual ability to withstand the normal hazards of transportation. Under such circumstances a shipper would be assuming no risk whatsoever. He would be in that enviable position to which all gamblers aspire, namely, "heads I win, tails you lose."

The principle which relieves a carrier of liability for spoilage or decay where its services are performed without negligence and in accordance with the instructions of the shipper is rested upon sound ground. It places the responsibility and burden of the loss on the party who is in the business of producing and marketing the perishable commodity, and who knows most about it. As stated in the *F. O. Bradley & Sons case, supra:*

> The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy, but of the cargo he knows little or nothing, and as the shipper has the advantage over him in this respect, he must bear the risks belonging to the cargo.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Supreme Court of Texas is in error and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid.

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January 13, 1964

APPENDIX

UNIFORM STRAIGHT BILL OF LADING—§§1(a) and (b)

(a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

RULES 130 AND 135—PERISHABLE PROTECTIVE TARIFF NO. 17

Rule 130—Condition of Perishable Goods Not Guaranteed by Carriers. — Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence.

Rule 135—Liability of Carriers.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived.

UNIFORM FREIGHT CLASSIFICATION NO. 4

Paragraphs (b), (c), (d) and (e) of Rule 1

(b) In order that consignor may have option of shipping property, either subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, hereinafter set forth, or under the liability imposed upon common carriers by common law and Federal and State statutes applicable thereto, this classification provides for different rates and for different forms of Bills of Lading to be used, respectively, as consignor may elect to have a limited liability or a common carrier's liability service.

(c) Unless otherwise provided in this Classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading (see pages 182 to 194, inclusive, of Classification), or Uniform Export Bill of Lading (see pages 195 to 200, inclusive, of Classification), as the case may be. If consignor elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, he should so notify agent of forwarding carrier at time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in order to secure the reduced rate.

The carriers are not required to transport property by any particular train or vessel or in time for any particular market or otherwise than with reasonable dispatch. (See Section 2(a) of bill of lading conditions.) Notations on bills of lading requiring delivery within or at a specified time will be without force or effect.

(d) Property carried not subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, will be carried at carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be 10% higher (subject to a minimum increase of one cent per 100 lbs.) than the rate

charged for property shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be.

(e) When consignor gives notice to agent of forwarding carrier that he elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, but desires a common carrier's liability service at the higher rate charged for that service, carrier must print, write or stamp upon Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, a clause signed by the agent reading: "In consideration of the higher rate charged, the property herein described will be carried at the carrier's liability, limited only as provided by law; but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability."